

***United States Court of Appeals  
for the Second Circuit***

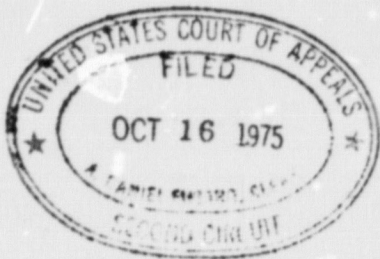


**APPENDIX**



75-7302

T-4814



APPENDIX  
IN THE  
SECOND CIRCUIT COURT OF APPEALS OF THE UNITED STATES

-----  
NO. T - 4814  
(1975)  
-----

DONALD SCHANBARGER,

Plaintiff - Appellant,

v.

JOHN J. McNULTY, Jr.,

Defendant - Appellee.

-----  
APPEALED ORDER OF JUDGMENT OF DISMISSAL OF COMPLAINT  
BY THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF NEW YORK  
-----

NOTICE OF APPEAL filed June 4, 1975

PAGINATION AS IN ORIGINAL COPY



# APPENDIX I N D E X

<u>paper</u>	<u>filed</u>	<u>page</u>
Complaint	February 25, 1975	1 - 2
Motion to dismiss complaint	March 18, 1975	2
Notice to dissmis		2 - 6
Exhibit "A"		5 - 6
Exhibit "B"		6
Cross motion notice to deny dismissal	April 8, 1975	6 - 7
Cross motion		7
Order	May 6, 1975	8 -13
Notice of Appeal	June 4, 1975	13

-----





(COMPLAINT)

App. 1.

1. Jurisdiction asserted is 42 U.S.C. Sec. 1983 and equal protection, due process and prohibited state conduct clauses of the 14th amendment of the United States Constitution.

2. The defendant was and is the Sheriff of Albany County, New York or posing as such a person.

3. Between October 7th thru 30th 1974, the plaintiff was incarcerated in defendant's jail known as the Albany County jail, where plaintiff was not supplied facilities to:

(a) Obtain writing paper at will for legal mail.

(b) To place mail for mailing more then 3 days a week, or 2 days a week should one mail day fall on a federal holiday.

(c) To mail legal mail that is not on jail printed stationary.

(d) Dental care with the exception of extracting teeth.

(e) Access to a library with criminal law books that would be needed to defend ones self from incarceration.

(f) Jail clothes.

4. Upon information and belief the facilities of this complaint were denial of plaintiff's rights guaranteed under the 14th amendment of the federal constitution, and wilfully so denied by the defendant by his failure to so provide as an intrinsic duty as an governmental officer in the state of New York, or denial of rights, privileges or immunities by usage, that plaintiff would had used if made freely available.

Plaintiff assurts Article 3. Sec. 2. of the federal constitution and raises the question

WHETHER A FEDERAL COURT FAILING TO TAKE JUDICIAL NOTICE OF THE UNITED STATES CONSTITUTION WITH OR WITHOUT REQUEST, VIOLATES THE PERSONAL RIGHTS CLAUSE OF THE 8th, 9th, & 10th AMENDMENTS AND EQUAL

App. 2.

(COMPLAINT), (NOTICE & MOTION TO DISMISS)

PROTECTION, PROHIBITED STATE CONDUCT AND DUE PROCESS CLAUSES OF THE 5th & 14th AMENDMENTS OF THE FEDERAL CONSTITUTION, WHEN EVERY MEMBER OF THE UNITED STATES JUDICIARY HAVE AGREED TO SUPPORT IT AS A CONDITION OF THEIR OFFICE AS SUCH A MEMBER.

WHEREFORE plaintiff demands judgment against said defendant in joining incarceration of any person without providing facilities of this complaint, for \$30,000. as exemplary and punitive damages, for costs, and for attorney fees.

verification  
-----

(NOTICE OF MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12 (d)(6))

PLEASE TAKE NOTICE, that upon the annexed affidavit of Terence L. Kindlon, sworn to the 18th day of March, 1975, and exhibits annexed thereto, and upon the summons and complaint, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a Motion Term thereof, to be held at the Court House thereof, located at the United States Post Office and Court House Building, Broadway, Albany, New York, on the 21st day of April, 1975, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 12(b)(6), Federal Rules of Procedure, dismissing the Claim alleged in the complaint herein, upon the ground that the complaint fails to state a claim upon which relief can be granted, and for such other and further relief as to the Court may seem just and proper.

-----

(NOTICE TO DISMISS)

TERENCE L. KINDLON, as an Assistant County Attorney for the



County of Albany, pursuant to rule 12 (b)(6) of the Federal Rules of Civil Procedure, moves the Court for an Order dismissing the pro se complaint herein on the ground that the complaint fails to state a claim upon which relief can be granted, for the reasons following:

1. The claimant states that certain of his constitutional "rights, privileges or immunities" were abrogated or otherwise infringed upon by certain practices, procedures, and conditions which prevailed in the Albany County Jail during the period of his incarceration, October 7 through 30, 1974.
2. The claimant specifically sets forth in his complaint six areas (paragraph 3, (a) through (f)) in which actions of jail officials or circumstances at the jail allegedly operated to deny him protection afforded by the United States Constitution.
3. Subdivisions (a), (b) and (c), paragraph "3" of claimant's complaint, deal with Albany County Jail policy relative to inmate's acquisition of stationery for the writing of correspondence the type of stationery provided and the posting of that correspondence. It is submitted that the policy of the jail is fair and reasonable, is fully consistent with New York State Department of Corrections Rules and Regulations relative to inmate's correspondence and in no way infringes upon rights secured by the United States Constitution.
4. Subdivision (d) paragraph "3" of claimant's claim alleges a denial of constitutionally protected "rights, privileges or immunities" in that the jail failed to supply the claimant-inmate with facilities for "dental care with the exception of extracting teeth".



It is observed that the claimant makes no allegation that he was, during his incarceration, in need of dental care and, moreover, the Second Circuit Court of Appeals has stated:

"...An action against prison officials for inadequate medical care may be brought under the Civil Rights Act in the Federal District Courts when the prisoner's allegations rise to the level of cruel and unusual punishment in violation of the Eighth Amendment..."Martinez v. Mancusi, 443 F2d 921, 923, Cert. denied 401 US 983.

The claimant's allegation relative to dental care fails to rise above a simple assertion and, it is submitted, indicates no infringement of constitutionally protected rights, privileges or immunities whatever.

5. Subdivision (e) of paragraph "3" asserts denial of access to a library with "criminal law books". This allegation is without merit. The Albany County Jail does maintain such a library for the convenience of inmates, despite the fact there is no requirement, statutory or constitutional, for this to be done.

6. Subdivision (f) of paragraph "3" alludes to "jail clothes". It is not clear from the allegation what the essence of claimant's complaint about jail clothing is. Nonetheless, it is submitted that no constitutional or statutory requirement relative to inmate's attire is recognized in the law, nor has any rule or regulation of the Department of Corrections been written on the topic.

7. Affidavits of Robert E. Beam, Warden of the Albany County Jail and Lawrence Palmateer, Jr., Assistant Secretary, New York State Commission of Corrections, both in support of this motion and attached hereto, marked Exhibits "A" and "B" respectively. Photo-

copies of relevant sections of New York Codes, Rules and Regulations, Title 7, Correctional Services, Sections 5100.5, et. seq. considered relevant to the issues raised by claimant's complaint, are attached hereto, marked Exhibit "C". In addition, a memorandum of law is being prepared in support of this motion to dismiss and will be submitted upon argument.

8. It is respectfully submitted that no action of Albany County Jail officials nor any conditions or circumstances which prevailed at the jail infringed upon rights, privileges or immunities secured the claimant by the United States Constitution during his incarceration.

9. It is further submitted that the complaint herein is so vague as to be almost incomprehensible, that those allegations which can be comprehended are without any colorable merit and that the said claim should be dismissed, on the merits.

10. Fewer than twenty-days have lapsed since receipt of the complaint.

WHEREFORE, your deponent respectfully moves this Court to enter an Order dismissing the plaintiff's claim, together with such other and further ruling as may be just and proper.

verification  
-----

(NOTICE TO DISMISS EXHIBIT "A")

ROBERT E. BEAM, being duly sworn, deposes and says:

1. I am the Warden of the Albany County Jail.

2. During the period of Donald Schanbarger's incarceration, October 7 - 30, 1974, writing paper was issued to inmates on the day



App. 6. (MOTION TO DISMISS EXHIBIT A & B) & (CROSS MOTION NOTICE)

prior to each mailing. Mailings were conducted three days a week--Monday, Wednesday and Friday, or two days a week should a mail day fall on a Federal holiday.

3. Emergency dental care for the extraction of teeth was provided inmates during this period.
4. Access to a library with criminal law books was provided to inmates during this period.

verification

-----

(NOTICE TO DISMISS EXHIBIT "B")

Lawrence Palmateer, Jr. being duly sworn, deposes and says:

1. I am Assistant Secretary at the New York State Commission of Corrections A. E. Smith State Office Building, 24th Floor, Albany, New York.
2. New York State Codes, Rules, or Regulations do not mandate provision of a law library to inmates of county jails or county penitentiaries.
3. New York State Codes, Rules or Regulations do not require that jail clothes be supplied to inmates of county jails or county penitentiaries.

verification

-----

(NOTICE OF CROSS MOTION)

PLEASE TAKE NOTICE, that upon the annexed affidavit of Donald Schanbarger dated March 26, 1975 and all papers of this case, the undersigned will move this Court at a Motion Term thereof, to be held at the Courthouse thereof, located at the United States Post Office and Court House, Broadway, Albany, New York, on the 21st day of April, 1975, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as plaintiff may be heard, for an Order denying Robert Roche's motion of dismissal of the Complaint, on

grounds of poor faith of movant of motion of dismissal, and for other and futher relief as seems just.

-----

(CROSS MOTION)

DONALD SCHANBARGER, being duly sworn, deposes and says:

1. He is the plaintiff of this above entitled case.
2. Robert Roche makes motion for judgment dismissing the Complaint on ground of insufficiency, which seems to plaintiff to obstruct the administration of justice under N. Y. CENTRAL v JOHNSON, 279 US 310, 319. For the only claimed right of the Complaint that the federal judiciary seems to be split, the plaintiff raises the following question, other rights seem to be supported by case law on a broad basis.

WHETHER A COUNTY SHERIFF IN FAILING TO SUPPLY HIS INMATES IN HIS JAIL WITH ACCESS TO A LIBRARY WITH CRININAL LAW BOOKS THAT WOULD BE NEEDED TO DEFEND ONE'S SELF FROM INCARCERATION VIOLATES THE EQUAL PROTECTION, PROHIBITED STATE CONDUCT AND DUE PROCESS CLAUSES OF THE 14th AMENDMENT OF THE FEDERAL CONSTITUTION, WHEN A HIRED DEFENCE WHETHER INNOCENT OR GUILTY FAILS WITHIN THE DOCTRINE OF WASTE.

3. Plaintiff has no information motion of dismissal is made at the direction of the defendant.

WHEREFORE plaintiff prays that motion of dismissal be denied in every respect and for other and futher relief as seems just.

verification

-----



---

DONALD SCHANBARGER,

Plaintiff,

-against-

75-CV-93

JOHN J. McNULTY, JR.,

Defendant.

---

APPEARANCES:

OF COUNSEL:

DONALD SCHANBARGER

Pro Se

Salem, New York 12865

ROBERT P. ROCHE

Albany County Attorney

Albany County Court House

Albany, New York 12207

TERENCE L. KINDLON

Assistant Albany County Attorney

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

This plaintiff filed a pro se two-page civil rights complaint and paid the fees for filing and service of process upon the single named defendant, Sheriff John J. McNulty, Jr. The complaint assumedly drawn by this layman, a dairy farmer in Washington County, succinctly and clearly sets forth the jurisdictional grounds and the general factual allegations based upon which constitutional violations are alleged to have occurred. The jurisdiction is asserted under the familiar 42 U.S.C. 1983, "and equal protection, due process and prohibited state conduct clauses of the 14th amendment of the of the United States Constitution."

The essential factual allegations to be appraised are set forth in paragraph 3 of the complaint:

Between October 7th thru 30th 1974, the plaintiff was incarcerated in defendant's jail known as the



Albany County jail, where plaintiff was not supplied facilities to:

- (a) Obtain writing paper at will for legal mail.
- (b) To place mail for mailing more than 3 days a week, or 2 days a week should one mail day fall on a federal holiday.
- (c) To mail legal mail that is not on jail printed stationary.
- (d) Dental care with the exception of extracting teeth.
- (e) Access to a library with criminal law books that would be needed to defend ones self from incarceration.
- (f) Jail clothes.

Judgment is demanded against the defendant Sheriff "injoining (sic) incarceration of any person without providing facilities of this complaint, for \$30,000. as exmplary (sic) and punitive damages, for costs, and for attorney fees."

In behalf of the defendant Sheriff, a formal motion was filed by the Albany County Attorney, specifically pursuant to Fed. R. Civ. P. 12(b) (6) to dismiss all the claims in the complaint upon the ground they fail to state claims upon which relief can be granted. The motion is supported by the affidavit of Assistant County Attorney Terence L. Kindlon and the attached Exhibits "A", "B" and "C". Exhibit "A" is an affidavit of Warden Beam that details the mailing regulations existent in the Albany County Jail, the provision for emergency dental care to extract teeth, and the access to criminal law books allowed inmates. The plaintiff in writing countered this motion by a motion to deny this motion for

dismissal "on grounds of poor faith". The motions were heard in open court, and the plaintiff presented his own argument in person, and it developed during the argument that he was wearing the same civilian clothes that he wore during his 90-day jail confinement and which he says should have been replaced by prison garb to lessen the wear and tear upon his own clothes. I asked the plaintiff if he wanted me to appoint a lawyer to assist him in presenting further briefing. He said he thought he could handle it and he filed a brief described as "Submitted after argument", and it does set forth adequately case and text reference that are in point and relate to the issues he claims have federal substances. It is apparent that plaintiff is devoting substantial time to the abundance of writing now existent concerning prisoner problems and the ever increasing resort to the federal courts for their presentation and review. There are noted rulings that complaints of this kind are to be treated with extreme liberality by the federal courts in the determination whether sufficient is alleged to warrant an opportunity to offer supporting evidence concerning the constitutional violations and deprivations. See *Haines v. Kerner*, 404 U.S. 519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971). Equally so this liberalism is to be balanced by the admonitions that federal courts do not have the responsibility to supervise the general administration of prisons and prison officials must be accorded the widest latitude in the administration of prison affairs, and prisoners are subject to appropriate rules and regulations. *Cruz v. Beto*, 405 U.S. 319, 321 (1972); see also *Procure-*



nier v. Martinez, 416 U.S. 396, 404-405 (1974). The violations and deprivations must amount to ones of constitutional stature, and in my view under settled federal case law, the only ones asserted here arguably so would be (d) and (e) of paragraph three of the complaint concerning dental care and access to criminal law books. In the oral argument, plaintiff described that his complaint about his personal dental care involved a filling or the need for one, and the failure to have an accumulation of criminal law books pertinent to his particular involvement with the law. In this context, neither in my judgment as presented create issues reasonably acceptable as one of federal constitutional magnitude.

In his complaints about the mailing privileges, there is no contention that the result was denial of access to the courts. See *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972); *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972). Correctional facilities and county jails have a right to regulate a prisoner's mail and federal courts do not interfere with such regulations. See *Procunier v. Martinez*, 416 U.S. 396 (1974); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

Medical treatment claims must allege deliberate indifference to its need and I assume dental treatment would come under the same rationale. *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972); *U.S. ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970); *Church v. Hegstrom*, 416 F.2d 449 (2d Cir. 1969); see also for extreme lack of proper medical treatment and necessary equipment, *Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), cert. den., *Alabama v. Newman*, \_\_\_\_\_

App. 12.

(ORDER)

U.S. \_\_\_\_\_, 4/28/75, 43 U.S. Law Week 3580. There is nothing of this nature contended from the reading of the allegations or developed in the oral argument of the plaintiff. The law book deprivation is lacking the same detail and substance in the form made and does not rise to constitutional stature. See Johnson v. Avery, 393 U.S. 483 (1969); Younger v. Gilmore, 404 U.S. 15 (1971), aff'g Gilmore v. Lynch, 319 F. Supp. 105 (ND Cal. 1970).

There is no intention in this writing to belittle the sincerity of the plaintiff in his alleged grievances. The plaintiff was courteous and pleasant in his oral argument, and frank and straightforward in response to court questions at that time. However, in my opinion, the grievances do not rise to the necessary constitutional level that warrant their entertainment and decision by a federal district court. The practices and conduct complained of conformed with State rules and regulations. These problems should be for the responsible state administrators whose duty under the State Constitution is to "visit and inspect ... all institutions used for the detention of sane adults charged with or convicted of crime." N.Y. State Constitution, Article XVII, Sec. 5. The management of the jails is controlled by detailed regulations which can be enforced by the State Commission of Correction. See 7 N.Y. Codes, Rules and Regulations, Chapter XXX, Part 5100 et seq.

The complaint is dismissed in its entirety for failure to state any viable claims under the federal civil rights statutes upon which relief can be granted. The formal motion of the defendant in that regard is granted, and the countermotion of the plaintiff



(ORDER) & (NOTICE OF APPEAL)

App. 13.

against dismissal is denied.

It is so Ordered.

Dated: May 5, 1975

Albany, New York

/S/ James T. Foley  
UNITED STATES DISTRICT JUDGE  
-----

(NOTICE OF APPEAL)

Notice is hereby given that Donald Schanbarger, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from an order and judgment dismissing the complaint in its entirety, entered in this action on May 6, 1975.  
-----